APPENDIX A

Michigan Supreme Court
Lansing, Michigan

ORDER

Entered: December 30, 1997

MAYOR OF LANSING and CITY OF LANSING,

Plaintiffs/Counter-Defendants-Appellees,

v

SC: 109240
COA: 187765
LC: 94-007936-AZ

KNIGHTS OF THE KU KLUX KLAN and DAVID A. NEUMANN,

Defendants/Counter-Plaintiffs-Appellants.

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the question presented should be reviewed by this Court.

APPENDIX B

STATE OF MICHIGAN
COURT OF APPEALS

MAYOR OF LANSING
and CITY OF LANSING,

Plaintiffs/Counterdefendants-Appellees,

FOR PUBLICATION
April 4, 1997
9:45 a.m.

v.

No. 187765
Ingham Circuit Court
LC No. 94-077936-AZ

KNIGHTS OF THE KU KLUX KLAN
and DAVID A. NEUMANN,

Defendants/Counterplaintiffs-Appellants.

Before: O'Connell, P.J., Markman and M. J. Talbot, JJ.

MARKMAN, J.

Defendants, the Knights of the Ku Klux Klan and David A. Neumann, appeal as of right from an order granting summary disposition for plaintiffs, the mayor of the City of Lansing and the City of Lansing, with regard to defendants' countersuit, which sought damages pursuant to 42 USC 1983 and for malicious prosecution. We affirm.

On July 8, 1994, following the issuance of a state permit for a Klan rally to be held on the grounds of the Capitol building on July 23, 1994, plaintiffs filed a complaint for injunctive relief, asking the circuit court to order that the rally be held at an alternate site in light of various public safety concerns. Defendants counterclaimed, alleging that plaintiffs' initiation of the suit constituted an unconstitutional prior restraint on defendants' First Amendment rights, in violation of 42 USC 1983 and the Michigan Constitution, and that the suit constituted malicious prosecution.

Plaintiffs' suit was prompted by the events attending defendants' previous rally on the Capitol grounds on April 23, 1994. Despite the presence of approximately 500 uniformed state and city police officers and total expenditures of $147,000 in public funds (including $47,000 by the City of Lansing), the April rally triggered occurrences of public disorder and violence. The mayor testified that "the crowd got out of control," "police security was breached," and that the police "lost control" and a police officer testified that "there came a point in time where basically we had no control of the crowd." On the basis of this history, the mayor asked defendants to change the location of the rally to a nearby city park --a more defensible but also a more remote location in terms of the potential audience for defendants' message. Defendants rejected the offer. Plaintiffs then filed a complaint seeking injunctive relief, claiming that they would be unable to provide adequate police protection for the second rally as

planned. The Ingham Circuit Court granted a preliminary injunction prohibiting the demonstration from being conducted on the Capitol grounds.

On appeal by defendants, a panel of this Court peremptorily reversed the circuit court's decision in an order that stated in relevant part:

> Based upon the facts presented to this Court in the briefs of the parties and in the complaint and affidavits of plaintiff, the circuit's court's July 21, 1994 preliminary injunction represents an abuse of discretion. The facts of this case do not justify enjoining defendant's exercise of its First Amendment rights in a quintessentially public forum, and we find that the preliminary injunction was not narrowly drawn to achieve a compelling state interest. *Madsen v Women's Health Center, Inc,* [512 US 573; 114 S Ct 2516; 129 L Ed 2d 593 (1994)]; *Forsyth County v The Nationalist Movement*, 505 US [123]; 112 S Ct [2395]; 120 L Ed 2d 101 (1992); *Frisby v Schultz,* 487 US 474; 108 S Ct 2495; 101 L Ed 2d 420 (1988); *Boos v Barry,* 485 US 312; 108 S Ct 1157; 99 L Ed 2d 333 (1988); *Perry Education Ass'n v Perry Local Educat[ors'] Ass'n,* 460 US 37; 103 S Ct 948; 74 L Ed 2d 794 *(1983); Christian Knights of the Ku Klux Klan [Invisible Empire, Inc.] v District of Columbia,* [297 US App DC 312]; 972 F2d 365 (1992). Insulting and even outrageous speech must be tolerated in order to protect First Amendment freedoms. *Boos v Barry, supra, 485* US at 322. The grounds of the State Capitol are both

> symbolic and directly relevant to defendant's intended message. The threat of violence relied upon by plaintiff is insufficient to prohibit entirely defendant's speech in the public forum chosen by defendant. [*Mayor of Lansing v Knights of the Ku Klux Klan,* unpublished order of the Court of Appeals, entered August 2, 1994 (Docket No. 177118)].

Based on conflicting interpretations of the scope and effect of our interlocutory decision, the parties then brought cross motions for summary disposition in the trial court. Defendants claimed that this Court's decision overturning the preliminary injunction rendered plaintiffs' case moot and that defendants were entitled to partial summary disposition with respect to their §1983 claim and to compensatory and punitive damages. Plaintiffs claimed that they were entitled to summary disposition with respect to the § 1983 claim because their request for injunctive relief had not been arbitrary or capricious and had sought only to impose a permissible restriction on the place the rally was to be held. Following oral argument, the trial court issued a written opinion and order granting plaintiffs' motion for summary disposition with regard to defendants' counterclaims, apparently pursuant to MCR 2.116(C)(10). The court concluded that plaintffs could not be held liable under 42 USC 1983 for seeking an overly broad injunction and that defendants' malicious prosecution claim failed because they had not demonstrated that plaintiffs' suit lacked probable cause.

The only issue before us is the appropriateness of the trial court's grant of summary disposition in favor of plaintiffs with respect to on the § 1983 counterclaim, because defendants do not challenge the dismissal of their malicious prosecution theory on appeal. This Court reviews decisions

regarding motions for summary disposition de novo to determine if the moving party was entitled to judgment as a matter of law. *Stehlik v Johnson (On Rehearing),* 206 Mich App 83, 85; 520 NW2d 633 (1994).

MCR 2.116(C)(10) permits summary disposition when, except for the amount of damages, there is no genuine issue concerning any material fact and the moving party is entitled to [judgment] as a matter of law. A court reviewing such a motion must consider the pleadings, affidavits, depositions, admissions, and any other evidence in favor of the opposing party and grant the benefit of any reasonable doubt to the opposing party. [*Id.*]

42 USC 1983 provides that a person, including a public officer, acting under color of law who:

> subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Proper analysis of a § 1983 claim against a municipality requires examination of two issues. "(1) whether plaintiff s harm was caused by a constitutional violation, and (2) if so, whether the city is responsible for that violation." *Collins v Harker Heights,* 503 US 115, 120; 112 S Ct 1061; 117 L Ed 2d 261 (1992). Here, we assume that the harm to defendants --which consists of a time-shifting of the planned rally due to judicial adjudication of the First Amendment issues-- was caused by a constitutional violation, because this Court reversed the preliminary injunction on First Amendment

grounds.[1] The issue before us, therefore, becomes whether plaintiffs' action of seeking an injunction to limit the location of the rally "caused" the constitutional violation.

Here, plaintiffs' actions consisted exclusively of availing themselves of the legal process to try to limit the location of defendants' rally. The United States Supreme

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[1] We note that consideration of a threshold issue might have obviated the necessity of reaching the constitutional questions. Defendants obtained their permit from the Michigan Capitol Park Commission, which has authority to promulgate rules pursuant to the Administrative Procedure Act of 1969, MCL 24.201, *et seq*; MSA 3.560(101, *et seq*, for the management and operation of the State Capitol and its grounds, MCL 18.1298c(b); MSA 3.516(298c)(b), The Commission consists of seven members, one of whom is a nominee of the mayor of the City of Lansing, MCL 18.1298(2); MSA 3.516(298)(2). The commission conducts its business subject to the Open Meetings Act and must give public notice of the time, date, and place of its meetings. MCL 18.1298a(l); MSA 3.516(298a)(1). Hence, we assume plaintffs had constructive, if not actual, notice that defendants' application for a rally permit would be up for consideration by the commission before the actual approval of the permit and, likewise, had notice of the issuance of the permit. Accordingly, plaintiffs had an opportunity to argue their justification and evidentiary support for time, place, and manner restrictions to the commission. In lieu of seeking injunctive relief, they could have pursued remedies pursuant to MCL 600.631; MSA 27A.631 (RJA §631) *1). Southeastern Oakland Co Incinerator Authority v Dep't of Natural Resources,* 176 Mich App 434; 440 NW2d 649 (1989). The present suit for injunctive relief was vulnerable to a motion to dismiss for plaintiffs' failure to exhaust its remedies under RJA §631. *Blue Cross & Blue Shield of Michigan v Comm'r of Insurance,* 155 Mich App 723, 729-734; 400 NW2d 638 (1986).

Court has recognized the validity under the First Amendment of injunctions placing narrowly-tailored time, place and manner restrictions on speech. See *Madsen, supra.*[2] Here, plaintiffs, having some reason to anticipate violence, attempted to strike at it preemptively by pursuing an injunction to limit the place of the planned rally to a more easily defended location. Plaintiffs presented a colorable claim that their proposed injunction constituted an appropriate time, place, or manner restriction on defendants' First Amendment rights and sought a court ruling with respect to the issue.[3]

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[2] The United States Supreme Court has recognized the power of the police to limit or curtail speech when there is a "clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order." *Feiner v New* York, 340 US 315, 320; 71 S Ct 303; 95 L Ed 295 (1951), quoting *Cantwell v Connecticut,* 310 US 296, 308; 60 S Ct 900; 84 L Ed 1213 (1940); see also *Cohen v California,* 403 US 15, 20; 91 S Ct 1780; 29 L Ed 2d 284 (1971) Recognizing that "the ordinary murmurings and objections of a hostile audience cannot be allowed to silence a speaker" and "mindful" of the possible danger of giving overzealous police officials complete discretion to break up otherwise lawful public meetings," the *Feiner* Court nevertheless held that when a situation threatens to turn into civil disorder, the authorities are not "powerless to prevent a breach of the peace." *Feiner, supra,* at 320-321. See also *Schenk v United States,* 249 US 47, 52; 39 S Ct 247; 63 L Ed 470 (1919),

[3] Any error on plaintiffs' part was exclusively in its application of the law to the situation at issue. Such legal errors do not generally subject a party to tort liability. For example, we note that Michigan does not recognize a separate civil action for perjury, *Meyer v Hubbell,* 117 Mich App 699, 704; 324 NW2d 139 (1982);

The direct "cause" of the constitutional violation here was the court's issuance of the overbroad injunction, not plaintiffs' pursuit thereof. If the court had denied the injunction, there would have been no constitutional violation. However, defendants argue that plaintiffs "caused" the constitutional violation because the court would not have issued the overbroad injunction unless plaintiffs had requested it. In other words, "but for" plaintiffs' lawsuit, the court would not have been prompted into taking its action.

Under federal law, the general rule is that if an injunction issues erroneously, any resulting irreparable injury is not redressable because the error was an act of the court, not of the party who sought the injunction. *Detroit Newspaper Puhlishers Assn v Detroit Typographical Union No.18, Int'l Typographical Union,* 471 F2d 872, 876 (CA 6, 1972). Similarly, in Michigan, at common law the general rule is that there is no tort liability for wrongfully suing out an injunction. *In re Pritchard Estate,* 169 Mich App 140, 149; 425 NW2d 744 (1988). Federal and state court rules provide exceptions to this general rule.[4] Nevertheless, under

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a fortiori, a litigant would not be liable for damages for making a non-perjurious, plausible legal argument. Further, in the absence of frivolousness, a losing party is not even liable for the other party's attorney fees, much less tort damages, for seeking recovery to which it is ultimately found unentitled. See MCR 2.625(A)(2), MCL 600.2591; MSA 27A.2591, *State Farm Automobile Ins Co v Allen,* 50 Mich App 71, 74-80; 212 NW2d 821 (1973).

[4] For example, with respect to the issuance of a preliminary injunction or temporary restraining order, FRCivP 65(c) and MCR 3.310(D)(1) provide for security, *in the amount the court deems proper,* for the payment of damages that "may be

the general rule, the act of filing a complaint seeking injunctive relief does not "cause" the erroneous issuance of the requested injunction for purposes of § 1983 because any erroneous issuance of an injunction is the act of the *court*.

More generally, the processes of the *law*, can be said to have caused any constitutional violation resulting from an injunction. Here, the circuit court sought to interpret §1983, the First Amendment, and the law concerning injunctions. The circuit court did nothing more than give voice to this law. That, in view of this Court, it ultimately erred in its interpretation does not alter the fact that it was the operation of the *law* itself that caused any resulting harm to defendants. Our legal system fully contemplates that courts will sometimes act in error and that such error win need to be corrected through an appellate process. Const 1963, art 6, §§l, 8, and 13. That such appellate process must be invoked before an error can be corrected does not mitigate the fact that it is the law itself that is working its effect upon the parties, not the will of the individual judge, much less that of the party initiating resort to the legal process. The law itself is responsible for the consequences of its operation, not the

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incurred or suffered by any party who is found to have been wrongfully enjoined or restrained." MCR 3.310(D)(1) explicitly indicates the discretionary nature of this relief by stating that the court "may" require such security. Such express provisions of relief to a party injured by an injunction, if anything, underscore the continued viability of the general rule in Michigan and the federal system, to wit, that relief is not generally available to a party so injured apart from these rules. That the posting of security is not required of municipal corporations that seek injunctions, MCR 3.310(D)(2), does not, in our judgment, alter this inference.

litigant who avails himself of that law.[5]

Moreover, a rule that transforms judicial error into a basis for tort liability by an adversely affected litigant would chill legitimate access to courts. The First Amendment right to petition the government has been construed to implicate the right of access to courts for redress of wrongs. *Sure-Tan, Inc v NLRB,* 467 US 883, 896-897; 104 S Ct 2803; 81 L Ed 2d 732 (1984); *Moore v Fragatos,* 116 Mich App 179, 185, n 3; 321 NW2d 781 (1982). Allowing a damages remedy here would elevate defendants' undeniable First Amendment rights over those of plaintiffs, when both sides here have call on the protections and guarantees of the United States Constitution. We believe that it would chill the right of access to the courts to make a litigant who invokes judicial remedies, in other than a frivolous proceeding, liable for damages for judicial error. No litigant, given a judiciary free of corruption and bias, has control over judicial actions.

Defendants rely on *Malley v Briggs,* 475 US 335, 344 n 7; 106 S Ct 1092; 89 L Ed 2d 271 (1986), in support of their contention that plaintiffs are responsible for the constitutional harm here. The *Malley* Court addressed the degree of immunity accorded a police officer whose submission of a criminal complaint that was facially inadequate to establish the requisite probable cause resulted in the issuance of an arrest warrant. It stated:

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[5] That there are additional transactional costs, in terms of delay, involved in an *appeal,* does not shift responsibility for the consequences of an erroneously granted injunction. Defendants' injury resulted from the fact that appellate correction of the circuit court's error was not instantaneous. However, the system does not generally compensate for such unavoidable delays of process.

> [Section] 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." Since the common law recognized the causal link between the submission of a complaint and an ensuing arrest, we read § 1983 as recognizing the same causal link. [*Id.* (citation omitted.)]

It held that the magistrate's action in authorizing the arrest warrant did not insulate the police officer from personal liability for a failure to exercise reasonable professional judgment in making the threshold determination whether the facts alleged could possibly justify an arrest. *Id.* at 345-346.

Defendants also cite a number of federal cases involving § 1983 causation issues.[6] All involve police officers who either provided misleading information or failed to provide relevant exculpatory information in pursuing criminal charges and who argued that they were not responsible for any constitutional deprivations because other parties, e.g., prosecutors, intervened. In *Jones v Chicago,* 856 F2d 985, 993-994 (CA 7, 1988), the court reiterated that "a man [is] responsible for the natural consequences of his actions"

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[6] *Jones v City of Chicago,* 856 F2d 985 (CA 7, 1988), *Robinson v Maruffi,* 895 F2d 649 (CA 10, *1990), Buenrostro v Collazo,* 973 F2d 39 (CA 1, *1992), DeLoach v Beavers,* 922 F2d 618 (CA 10, *1990), Goodwin v Metts,* 885 F2d 157 (CA 4, 1989), *Wagenmann v Adams,* 829 F2d 196 (CA 1, 1987), *Reich v Minnicus,* 886 F Supp 674 (SD Ind, 1993), *Johnson v Chicago,* 711 F Supp 1465 (ND Ill, *1989), Mitchell v City of Hartford,* 674 F Supp 60 (D Conn, 1986).

(citations omitted) and that *Malley* held that the issuance of an arrest warrant will not shield a police officer from liability if a reasonably well-trained officer would have known that his affidavit failed to establish probable cause. It continued:

> By parallel reasoning, a prosecutor's decision to charge, a grand jury's decision to indict, a prosecutor's decision not to drop charges but to proceed to trial -- none of these decisions will shield a police officer who deliberately supplied misleading information that influenced the decision. . .
>
> If police officers have been instrumental in the plaintiff's continued confinement or prosecution, they cannot escape liability by pointing to the decisions of prosecutors or grand jurors or magistrates to confine or prosecute him. They cannot hide behind the officials whom they have defrauded. [*Id.* at 994]

These cases involve factual misrepresentations by police officers to the parties responsible for deciding whether to proceed with criminal charges or whether there is sufficient evidence to issue arrest or search warrants. In this context, where a subsequent decision-maker makes a decision solely on the basis of information provided by a police officer, usually in an ex parte presentation, that decision cannot shield the officer who engaged in wrongdoing by supplying false or misleading information. The misleading information is so enmeshed in the decision of the subsequent decision-maker that the officer's misconduct merges with the action of the subsequent decision-maker. The essential point of these cases is that where the officers' misconduct taints the legal process,

a decision bearing that taint cannot insulate the officer from liability.

Defendants cite *Wyatt v Cole,* 504 US 158, 164 -165; 112 S Ct 1827; 118 L Ed 2d 504 (1992), for the proposition that § 1983 liability extends to parties who "set the wheels of government in motion by instigating a legal action." Actually the portion of *Wyatt* cited by defendants states only that the absolute immunity accorded public prosecutors and judges at common law "did not extend to complaining witnesses who, like respondents, set the wheels of government in motion by a legal action." Id. Thus, the *Wyatt* Court did not address the issue of the plaintiff's affirmative liability under § 1983 for seeking relief under the statute but only addressed whether they were entitled to absolute immunity akin to that of selected public officials. *Id.* at 168-169.

Further, *Wyatt* involved a statute allowing seizure of property on the basis of *ex parte proceedings.* See also *Lugar v Edmonson Oil Co,* 457 US 922; 102 S Ct 2744; 73 L Ed 2d 482 (1982). In these cases, the courts made decisions to seize or execute on property on the basis of information provided solely by the party seeking such relief and subsequent hearings required by the statutes resulted in the dismissal of the complaints. That these courts changed their minds about the propriety of seizure or execution suggests that, only upon the subsequent full hearings were the courts provided with a complete recitation of the facts necessary to resolve the controversies. Accordingly, we believe that these cases also involved situations where the actions of the parties seeking relief may be understood to have merged with the judicial actions.

The rationale of these cases carve out an exception to the general rule that the court - or more properly the law itself - rather than the party seeking an injunction, is responsible for

a wrongly issued injunction. We note that the *Malley* Court itself expressly indicated that it was announcing an exception to the general rule that parties requesting relief are not responsible for errors by a court in issuing such relief

> [I]t goes without saying that where a magistrate acts mistakenly in issuing a warrant but within the range of professional competence of a magistrate, the officer who requested the warrant cannot be held liable. But it is different if no officer of reasonable competence would have requested the warrant, *i.e.*, his request is outside the range of the professional competence expected of an officer. [*Malley, supra* at 346 n 9.]

This exception applies when the party seeking an injunction engages in misconduct that taints the process such that the court's decision cannot be separated from the party's misconduct. For example, in *Dennis v Sparks,* 449 US 24, 25, 31-32; 101 S Ct 183; 66 L Ed 2d 185 (1980), the Court held that private parties who "participate in subverting the judicial process" by conspiring with a judge to "corruptly" issue an injunction were not immune from § 1983 damages liability. A merger of a party's actions with judicial action is also sometimes implicated when judicial decisions are made on the basis of ex parte proceedings. Ex parte proceedings allow a party to present a single version of the facts and applicable law without an opportunity for an opposing party to contest these representations. The possibility that concerned the *Malley* court with regard to arrest warrants --"it is possible that a magistrate, working under docket pressures, will fail to perform as a magistrate should," *Malley,* at 345-346 is largely vitiated in an adversarial proceeding. The actions of a party do not merge with the court's actions when

the court is able to fulfill independently its adjudicative responsibilities and to exercise its discretion on the basis of information gleaned in an adversarial proceeding.

The proposition that a party is "responsible for the natural consequences of his actions" is limited where subsequent, independent factors are more proximately responsible for the consequences. In the cases cited by defendants, this proposition held because the officers' misconduct infected the subsequent decisions of prosecutors or judges and thereby remained a proximate cause of any constitutional violations. However, generally, in the absence of misconduct by a party that taints the process and the independence of subsequent decisionmakers, what emerges from the legal process is more directly a consequence of the dictates of the law than the conduct of a litigant.

Here, plaintiffs' pursuit of the injunction, which was ultimately determined to be overbroad, did not taint the legal process. Plaintiffs did not engage in any wrongdoing. Plaintiffs did not make misrepresentations that would have undermined the trial court's ability to perform its adjudicative function or to exercise its discretion. Plaintiffs simply made the colorable argument that their proposed injunction was warranted under the undisputed facts relating to the previous Klan rally. Plaintiffs' attorney, exercising "reasonable professional judgment," *Malley, at* 346, could have responsibly concluded that the request for preliminary injunctive relief was justified by the facts and the law. Further, the proceedings were not ex parte. They were conducted adversarially, as required by MCR 3.310(A)(1); both parties had a full opportunity to proffer evidence, to contest proofs advanced by the other and to argue their respective positions. The trial court was thus properly apprised of the facts and the arguments of both sides and was

able to make an informed judgment concerning the merits of the proposed injunction. The exercise of this independent judgment by the court, untainted by any misconduct on plaintiffs' part, constitutes the "cause" of the constitutional violation at issue.

For these reasons, we conclude that defendants cannot raise a genuine factual issue indicating that plaintiffs were responsible for the constitutional violation at issue. Accordingly, the trial court properly granted plaintiffs' motion for summary disposition regarding the §1983 claim, albeit on the basis of a different analysis than that articulated here. Therefore, we will not disturb the circuit court's holding on appeal. See *In re Condemnation of Private Property to Acquire Land for the Detroit Metropolitan Wayne Co Airport,* 211 Mich App 688, 692; 536 NW2d 598 (1995).

Affirmed.

/s/ Stephen J. Markman
/s/ Peter D. O'Connell
/s/ Michael J. Talbot

APPENDIX C

STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF INGHAM

DAVID C. HOLLISTER, et al.,
Plaintiffs/Counter-Defendants.

File No. 94-77936-AZ
Hon. Lawrence M. Glazer

v.

KNIGHTS OF THE KU KLUX KLAN,
et al.,
Defendants/Counter-Plaintiffs.

OPINION AND ORDER

Section 1983 Claim

The Klan argues that the City's seeking of an injunction constituted an unconstitutional prior restraint upon free speech.

It is important that certain distinctions be plainly stated. The City's petition to this Court did not request an order that would be unconstitutional under any and all (or even under most) circumstances, unlike the "Pentagon Papers" case, in which the U.S. government sought a flat

prohibition on any publication of certain classified documents. Instead, the City sought a restriction as to the place and time of a planned speech and demonstration. Such a restriction is not *per se* unlawful, as many cases have held, most prominently *Christian Knights of the KKK* v *District of Columbia*, 973 F2d 365 (1992).

This Court is aware of no case which deals with the issue as to whether petitioning a court to restrict the time, place or manner of a proposed demonstration constitutes unlawful prior restraint.

The Klan argues that *Malley v. Briggs*, 106 S. Ct. 1092 (1986) is such a holding.

In *Malley*, the petitioner, a state policeman, had sought and obtained an arrest warrant for respondent based on logs of court-approved wiretaps. After the arrest, the grand jury did not return an indictment and the criminal case was dropped, whereupon Respondent filed a Sec. 1983 action against petitioner.

At trial the Court granted directed verdict for petitioner on the ground that submission of the arrest warrant to a magistrate broke the causal chain between petitioner's filing of a complaint and respondent's arrest, and petitioner was therefore entitled to immunity.

The First Circuit Court of Appeals reversed, holding that an officer is not entitled to immunity unless there is an objectively reasonable basis for believing that the facts stated in his/her affidavit are sufficient to establish probable cause.

The Supreme Court affirmed, holding that there is no absolute immunity for executive branch officials under Sec.

1983, but only qualified immunity where, objectively, officers of reasonable competence could disagree on whether a warrant should issue. Only where the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable... will the shield of immunity be lost. (At 1098).

Malley did hold that an officer of the executive branch who seeks to restrict the liberty of a citizen, by arresting the citizen, does not acquire unqualified immunity by petitioning a court to authorize the arrest.

In the present case, the issue is not immunity, but whether the Klan has a cause of action. Nevertheless, even applying the standard announced in Malley, in order to find liability this Court would have to conclude that City officials of reasonable competence could not disagree that the City of Lansing had no basis in fact or law to seek the injunction which was sought in this case.

On this record the Court cannot make such a finding. As this Court stated:

"Captain Rapp testified, and his testimony was undisputed, that there were intelligence reports, and posters posted throughout the City which threatened escalated violence, and possibly deadly violence, by organized groups should the Klan rally."

"Lt. Cook testified, and his testimony was undisputed, that the City was just barely able to avert a riot . . . at the end of the April rally . . . and this was with a field force of 500 officers . . . He further testified that the City cannot muster a field force of anywhere near that size this coming Saturday. No testimony was elicited that would call

this into question, no testimony was elicited that this was some phony budgetary excuse. . . ."

"Furthermore, the City has provided an alternative site which its officials believe can be adequately policed, and the testimony is undisputed that any speakers sponsored by the Klan at that site would be able to communicate their message to each other as well as to members of the public." (Transcript of July 19, 1994 hearing)

Thus the facts of record supported the City's petition.

Moreover, there was no disagreement between the parties that the D.C. Circuit Court of Appeals decision in *Christian Knights* stated the applicable law; both parties cited that case to this Court, which then applied that decision to the undisputed facts of record.

In *Christian Knights* the D.C. Circuit Court of Appeals affirmed the trial Court's findings of fact that the authorities did have the ability to police the proposed march, but expressly declined to rule that ". . . the First Amendment forbids authorities, under any circumstances, to place any preconditions on public demonstrations because of the prospect of violent reaction. We cannot agree that a threat of violence is an impermissible ground even for a time, place and manner limitation. When the choice is between an abbreviated march and a bloodbath, government must have some leeway to make adjustments necessary for the protection of participants, innocent onlookers and others in the vicinity." (At 374)

The Court of Appeals 'one-paragraph order of peremptory reversal did not overrule the above-summarized findings of fact, nor did it disagree that *Christian Knights*

permits reasonable restrictions on time, place and manner when the prospect of reactive violence is real. As this Court understands the Order, the Court of Appeals merely ruled that this Court erred in holding that the State Capitol grounds held no symbolic significance for this demonstration and in ordering an overly broad remedy of moving the demonstration to another location.

The significance of this is that if this Court had effectuated a narrower injunctive remedy, leaving the demonstration at the Capitol, the appellate result might have been different.

In other words, as this Court understands it, the Court of Appeals did not hold that the City had no cause of action, just that the remedy sought (and granted) was too broad. The scope of an injunction may be (and should be) tailored by the Court to achieve the desired end as narrowly as possible. In this it is unlike an arrest warrant, which a magistrate can only approve or disapprove.

The law does not make the City liable in damages simply because it sought too broad an injunction.

Thus, the City's motion for summary disposition on the Sec. 1983 claim must be granted.

Malicious Prosecution

Defendant's counterclaim for malicious prosecution is a straightforward tort claim and is not part of its Sec. 1983 claim. Thus it is resolved under Michigan law.

According to *Friedman v. Dozorc*, 412 Mich 1 (1981), the elements of malicious prosecution are: (1) Prior

proceedings terminated in favor of the instant plaintiff, (2) absence of probable cause for those proceedings, (3)'malice', i.e., a purpose other than that of securing the proper adjudication of the claim in which the proceedings are based, and, (4) in a claim arising from a civil action, special injury.

This Court agrees with counter-Plaintiff that the prior proceedings have terminated in favor of counter-Plaintiff, in that the Court of Appeals reversed this Court's grant of the injunction and Plaintiffs have not appealed that order.

However, this Court cannot find that Plaintiffs' suit lacked probable cause. As detailed above in analyzing the Sec. 1983 claim, this Court was persuaded that both the facts and the law supported Plaintiffs' claim. It is self-evident that 'lack of probable cause' requires something more than mere termination of the suit in favor of counter-Plaintiffs.

In *Fort Wayne Mtg. v. Carletos*, 95 Mich App 752 (1980), the Court of Appeals held that lack of probable cause is established (in the context of a criminal prosecution) where a defendant "failed to make a full and fair disclosure of all material facts, if he gave false information, or if he interfered with the official's discretion" (at 758)

In the present case there is no evidence that Plaintiffs concealed material facts in their petition or their testimony, or gave false facts. It is worth restating that the Court of Appeals reversed on a point of law, and the facts found by this Court must be presumed to be sound.

Therefore, the Counter-Defendants' motion for summary disposition on malicious prosecution is granted for failure to plead facts constituting the element of no probable cause.

Finally, the Court declines to award sanctions against Plaintiffs for failure to voluntarily dismiss its claim after that claim was mooted by time. This is not a case in which Plaintiff"s counsel failed to make inquiry of its client, resulting in a non-viable suit continuing; the facts were equally known to counsel for both sides. In the negotiations between the parties after this Court's hearing, it is clear that there was much to discuss besides the Plaintiff's claim; there was Defendants' counter-claim and the prospect of further demonstrations. Defendants, knowing the facts as well as Plaintiffs, could take the mootness into account in these negotiations.

/s/
Lawrence M. Glazer, Circuit Judge

Dated: June 20, 1995

APPENDIX D

ORDER

Mayor of Lansing v
Knights of the Ku Klux Klan, et al.

Martin M. Doctoroff
Presiding Judge

Docket # 177118

Kathleen Jansen
Clifford W. Taylor
Judges

L.C. # 94-77936 AZ

The Court orders that the motion for immediate consideration is **GRANTED**.

The Court orders that the motion for peremptory reversal pursuant to MCR 7.211(C)(4) is GRANTED. Based upon the facts presented to this Court in the briefs of the parties and in the complaint and affidavits of plaintiff, the circuit's court's July 21, 1994 preliminary injunction represents an abuse of discretion. The facts of this case do not justify enjoining defendant"s exercise of its First Amendment rights in a quintessentially public forum, and we find that the preliminary injunction was not narrowly drawn to achieve a compelling state interest. *Madsen v Women's Health Center, Inc, 512* US 573; 114 S Ct 2516; 129 L Ed 2d

593 (1994); *Forsyth County v The Nationalist Movement*, 505 US 123; 112 S Ct 2395; 120 L Ed 2d 101 (1992); *Frisby v Schultz*, 487 US 474; 108 S Ct 2495; 101 L Ed 2d 420 (1988); *Boos v Barry*, 485 US 312; 108 S Ct 1157; 99 L Ed 2d 333 (1988); *Perry Education Ass'n v Perry Local Education Assn*, 460 US 3 7; 103 S Ct 948; 74 L Ed 2d 794 *(1983); Christian Knights of the Ku Klux Klan v District of Columbia*, 297 US App DC 312; 972 F2d 365 (1992). Insulting and even outrageous speech must be tolerated in order to protect First Amendment freedoms. *Boos v Barry, supra, 485* US at 322. The grounds of the State Capitol are both symbolic and directly relevant to defendant's intended message. The threat of violence relied upon by plaintiff is insufficient to prohibit entirely defendant's speech in the public forum chosen by defendant.

This interlocutory matter is **REMANDED** for further proceedings. Jurisdiction is not retained.

Date: Aug 02, 1994

/s/
Chief Clerk